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No. 81-1891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether, despite the plain language and the legislative history of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") and fifty-four years of consistent administrative interpretation by the Department of Labor that has never been disturbed by Congress, the Court of Appeals was correct in concluding, for the first time by any federal court, that employer payments into union trust funds are part of an employee's "average weekly wage" under the Act.

2. Whether the true purpose of calculating a worker's wage, at the time of death, for purposes of the LHWCA, is to restore a portion of what his or her surviving spouse has actually lost by reason of the death, rather than, as the Court of Appeals held, everything of "value" that can be identified and thus included in the worker's wage, even though the surviving spouse will never qualify for the thing of value.

3. Whether the decision of the Court of Appeals should be allowed to stand when it will result in new and endless litigation contesting which trust fund contributions should now be considered part of an employee's "average weekly wage" under workers' compensation statutes, and how much each of these interests is worth under the particular facts of each case, despite this Court's ruling that one of Congress' principal legislative purposes was to ensure "prompt and certain recovery" of a "limited and determinate" amount.

LIST OF PARTIES *

The parties in case No. 80-1388 before the Court of Appeals were Sonia Hilyer, the widow of James H. Hilyer, as petitioner, and Morrison-Knudsen Construction Company ("Morrison-Knudsen") and Argonaut Insurance Company ("Argonaut") as respondents. The parties in case No. 80-1440 were Morrison-Knudsen and Argonaut as petitioners and Mrs. Hilyer as the respondent. The parties in case No. 80-1504 were the Director of the Office of Workers' Compensation of the United States Department of Labor as the petitioner and Morrison-Knudsen and Argonaut as respondents.

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* Petitioner, Morrison-Knudsen Construction Company, reports, pursuant to Rule 28.1 of the Rules of this Court, that Morrison-Knudsen Company, Inc. is the parent company with subsidiary companies which are all wholly-owned. Affiliate companies not wholly-owned include: Accurate Manufacturing Company, Internacional de Engenharia S. A. (IESA), Moore Financial Group, Inc., George E. Madding Company, Inc., and Westmoreland Resources, Inc.

Argonaut Insurance Company is a wholly-owned subsidiary of Teledyne Financial Corporation, which is a wholly-owned subsidiary of Teledyne, Inc. The following is a list of companies which are not wholly-owned subsidiaries of Teledyne, Inc., or its subsidiaries, but which may be deemed to be affiliates: Brockway Glass Company, Curtiss-Wright Corporation, Litton Industries, Inc., Riechhold Chemical Company, Teledyne Canada Limited, and Unicoa Corporation.

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SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at *Hilyer* v. *Morrison-Knudsen Construction Co.*, 216 U.S. App. D.C. 50, 670 F.2d 208 (1981), and appears as Appendix C to the Petition ("Pet. App.").[1] The orders of the Court

[1] We use the following abbreviations to refer to the materials in this case: "Pet. App." (Appendix to Petition for Writ of Certiorari); "Pet. Reply" (Petitioners' Reply to Respondent Hilyer's Opposition to Petition); "Pet. Supp. Memo." (Petitioners' Supplemental Memorandum); "JA" (Joint Appendix filed in conjunction with briefs on the merits); "Fed. Br." (Brief for the Federal Re-

of Appeals denying a Petition for Rehearing and a Suggestion for Rehearing En Banc, dated January 14, 1982, are not reported, but appear at Pet. App. A and B.

The original decision and order of the Administrative Law Judge (No. 76-DCWC-158) issued September 7, 1976, is not reported, but appears as Pet. App. H (Pet. App. 36a). The order of the Benefits Review Board (Nos. 76-410, 410A) dated November 30, 1977, is reported at 6 B.R.B.S. 754, and appears as Pet. App. G (Pet. App. 28a). The per curiam order of the United States Court of Appeals for the District of Columbia Circuit (Nos. 77-2076, 78-1087), dismissing the petition for lack of jurisdiction, filed July 19, 1978, is not reported, but appears as Pet. App. F (Pet. App. 27a).

The decision and order on remand of the Administrative Law Judge (No. 76-DCWC-158) dated October 5, 1978, is not reported, but appears as Pet. App. E (Pet. App. 23a). The order of the Benefits Review Board (No. 78-568), dated March 19, 1980, reviewed by the Court of Appeals in this case, is reported at 12 B.R.B.S. 87, and appears as Pet. App. D (Pet. App. 17a).

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1). The decision of the Court of Appeals in these

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spondent in Response to Petition for a Writ of Certiorari); "Hilyer Br. in Opp." (Brief for Respondent Hilyer in Opposition to Petition for a Writ of Certiorari); "Alliance Br." (Brief for Amici Curiae Alliance of American Insurers & Nat'l Assoc. of Indep. Insurers in Support of Petition for a Writ of Certiorari); "AIA Br." (Brief for Amici Curiae American Ins. Assoc. in Support of Petition for a Writ of Certiorari); "AFL-CIO Br." (Brief for Amicus Curiae Metropolitan Washington Council, AFL-CIO, in Opposition to Petition for a Writ of Certiorari); "Steve. Br." (Brief on the Merits for Amicus Curiae National Assoc. of Stevedores); "Ship. Br." (Brief on the Merits for Amicus Curiae Shipbuilders Council of Am.); "PX" (Plaintiff's Exhibit introduced at the July 1, 1976, hearing before the Administrative Law Judge); "Tr." (Transcript of July 1, 1976, hearing before the Administrative Law Judge).

cases was rendered on December 1, 1981 (Pet. App. 4a). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on December 15, 1981, and denied on January 14, 1982 (Pet. App. 1a, 3a). The Petition for a Writ of Certiorari was filed on April 13, 1982, and was granted on October 4, 1982.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth at Pet. App. I (Pet. App. 50a *et seq.*).

STATEMENT OF THE CASE

These are three cases—all involving the same claimant and the same legal issues—which were consolidated on appeal in the United States Court of Appeals for the District of Columbia Circuit. All three cases arose from the death of James H. Hilyer during the course of his employment with petitioner Morrison-Knudsen Construction Company ("Morrison-Knudsen"). At the time of his death, Hilyer was covered by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501, 502 (1973), which in turn incorporated the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (1976) ("LHWCA") (Pet. App. 50a).[2] Under Section 9(e) of the LHWCA (Pet. App. 52a), death benefits are computed by reference to the "average weekly wage" of the deceased employee on an annualized basis.[3]

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[2] Although a new District of Columbia statute went into effect on July 26, 1982, it contains the same definition of "wages" interpreted by the court below. 36 D.C. Code § 301(19) (1981). Moreover, the definition espoused by the Court of Appeals was of the LHWCA, which of course has wider application than in the District alone.

[3] However, since Hilyer had been working for Morrison-Knudsen for only five months prior to his death, the Administrative Law Judge, pursuant to Section 10(b) and (d) of the Act (Pet. App. 53a-54a), correctly determined Hilyer's average weekly wage by reference to the average *yearly* wages of a fellow employee whose compensation could most closely be compared to that of Hilyer.

At the time of his death, Hilyer had been a member of Local 456 of the Laborers' District Council of Washington, D.C., and Vicinity—an affiliate of the AFL-CIO. The collective bargaining agreement between that union and Hilyer's employer required the employer to make certain payments to three union trust funds for each hour worked by each employee—namely, 28 cents into a health and welfare fund, 35 cents into a pension fund, and 5 cents into a training fund. PX 3 (JA 38-40).

Trust fund agreements for both the health and welfare and pension funds set out the basic requirements for receiving benefits and the schedule of payment for such benefits. Most of these benefits are awarded in situations *not* involving a job-related death or injury. PX 3 (JA 37-40); PX 7 (JA 44, 49-56, 60-68, 70-73). However, where benefits are paid which do relate to a job-related death or injury, the agreements do not require those benefits to be offset by any workers' compensation benefits. Furthermore, the trust agreements authorize the Board of Trustees alone to administer the trust funds (PX 7 (JA 59-60)), and at no time have employees had any voice in that administration. Tr. 60-61 (JA 32-33). The training fund was created for the purpose of training persons to perform the work covered by the collective bargaining agreement. PX 3 (JA at 40).

Hilyer's widow, respondent Mrs. Hilyer, argued before the Administrative Law Judge that the payments to the union trust funds should be included in her husband's "average weekly wages" for the purpose of calculating the death benefits to be paid to her by Morrison-Knudsen. Following an unbroken tradition since the LHWCA's adoption in 1927, the Administrative Law Judge rejected her contention (Pet. App. 36a), and the Benefits Review Board upheld his ruling (Pet. App. 28a).[4] In rejecting

[4] The case was remanded for a reconsideration of attorneys' fees. A new opinion was rendered dealing with this issue (Pet. App. E), which was reviewed and modified by the Benefits Review Board

Mrs. Hilyer's claim, the Board noted consistent Board authority holding that contributions by an employer to a health and welfare fund and a pension fund are not includable in wages, and found, moreover, that the record did not reflect whether Mr. Hilyer's rights in the funds had even vested.[5]

The Court of Appeals thereafter reversed the Board and held, for the first time by any federal court, that because the payments to the union funds were "readily identifiable and calculable" and were of substantial economic benefit to the employee, the payments were part of Hilyer's "average weekly wage" (Pet. App. 4a). In so ruling, the court purported to interpret "wages," which is defined as follows in Section 2(13) of the LHWCA, 33 U.S.C. § 902(13):

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

(Pet. App. D). Although that issue was addressed by the Court of Appeals (Pet. App. 14a-16a), it is not before this Court for review.

[5] The Board observed that "inclusion of the contributions to the pension fund reflects a belief that the employee would also continue to work for employer and build up his pension" (Pet. App. 32a), that the health and welfare fund was "contingent on an illness occurring" (*id.*), and that the actual value of the health and welfare program was "dependent on their [the family's] possible use of it" (Pet. App. 33a). The Board further noted that amounts contributed by the employer would "in all likelihood not buy decedent's family similar kinds of protection" (*id.*), and that the value of the training program was "highly speculative" (*id.*). The Board concluded:

> Therefore, it is clear that in this case that an employee's right to these funds and the actual value of them to the injured employee is highly speculative. [*Id.*]

According to the court, "Congress chose to carry out [the] design [of the LHWCA] by including in the compensation formula *all* of the identifiable value, in whatever form it may appear, that the employee was receiving in return for his labor at the time of the injury." Pet. App. 13a (emphasis in original).

SUMMARY OF ARGUMENT

Each of the standard guides for statutory construction—the plain language of the text, the underlying purpose of the statutory provision, the legislative history of the act, the authoritative interpretation by the enforcing agency, and the practical consequences of the construction—demonstrates that union fund contributions, like those sought by respondent, form no part of the "wages" payable under the LHWCA.

Union fund contributions, like pensions or disability benefits, are nowhere mentioned in the statutory definition of "wages." The plain language of that definition demonstrates that Congress intended to limit that term to items which are paid directly to the worker and which are related to the preinjury standard of living of the worker or his family. This limitation is confirmed by the Court's construction of "wages" in similar statutes. Moreover, in those instances when Congress has intended to include union fund contributions in "wages," it has explicitly provided therefor in the statute.

The basic purpose of the "wage" calculation is to restore a portion of what the worker's spouse has in fact lost by reason of the worker's death, in terms of what the family was accustomed to rely on to maintain its standard of living. In light of this purpose, the spouse has lost nothing by the failure of the union fund contributions represented by the trust funds.

The legislative history of the LHWCA demonstrates that Congress did not intend that employer contributions to labor trust funds be part of "wages" payable under the

Act. The Act was adopted solely to offer longshoremen the same benefits then available to other employees under state workers' compensation programs. Under this Court's decisions, Congress is deemed to have intended that statutory words should have the meaning authoritatively attributed to them at the time the LHWCA was passed. The term "wages" never at that time, nor at the time of any of the four benefit-altering amendments to the Act, included employer contributions to trust funds, either in the New York act from which the LHWCA was copied, or in any other compensation act. In 1972 a massive overhaul of the Act was undertaken, with a dramatic increase in benefit levels, but the definition of "wages" was not changed. Since the final benefit levels were the result of a fine balancing of interests, Congress could not also have contemplated an implied amendment of "wages" that might increase benefits 30 to 60 percent.

The Department of Labor, the federal agency charged with the administration of the LHWCA, has consistently construed the definition of "wages" to exclude an employer's trust fund contributions. This long-standing construction of the Act by its enforcing agency is entitled to considerable weight before this Court.

Relying on the Department's construction of the Act, the affected employers and insurers have consistently ordered their affairs without taking these employee benefits into consideration when setting insurance premiums or allocating reserves. Moreover, the disastrous consequences of including these benefits as part of "wages" demonstrate that Congress could not have intended to inflict such massive and unexpected costs upon the struggling longshoring and shipping industries. Even more importantly, the practical effect of the interpretation below will be the subversion of every purpose Congress intended the LHWCA to serve: whereas Congress intended benefits under the LHWCA to be fixed and limited, the decision below will render them indeterminate and virtually unlimited; whereas Congress intended the award-

ing of benefits to be swift and certain, the decision below will engender such dispute and litigation over compensable "values" that awards will no longer be timely paid; and whereas Congress intended through the LHWCA to replace the common-law tort system of recompense, the decision below will in effect revive that system.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE DEMONSTRATES THAT CONGRESS DID NOT INTEND TRUST FUND CONTRIBUTIONS TO BE INCLUDED IN "WAGES."

A. The Key Features Of The Term "Wages."

The plain language of the LHWCA demonstrates that trust fund contributions such as those here at issue are not included in wages. "Wages," as used throughout the Act, are defined as "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury * * *." 33 U.S.C. § 902 (13). The money rate is to include "the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer." *Id.* This definition of "wages" has remained unchanged since the Act was passed in 1927.

The special payments listed in the Act—board, rent, housing, lodging and gratuities—have two key features in common. They are paid directly and unconditionally to the employee, and they have a clear and present cash value. The same is true of other payments which, by a broad extension of the statutory language, have been recognized as coming within the phrase, "similar advantage"—namely, transportation, overtime and vacation pay.[6] By contrast, payments into a union trust fund are

[6] *See* 4 A. Larson, *The Law of Workmen's Compensation* § 60.12 (a), (b), pp. 10-564 to 10-573, and cases there cited (1978) (hereafter cited as *Larson*). *Cf. Harris* v. *Lambros*, 56 F.2d 488 (D.C. Cir. 1932).

not paid to the worker, nor can the worker at any time demand their value in cash. Here, for example, the record shows that Hilyer had no right to tell his union how to use the funds (Tr. 60-61 (JA 32-33)), and there is no evidence that before his death he even had a vested interest in them. Under the maxim *noscitur a sociis*,[7] the phrase "or similar advantage" should relate to benefits that similarly are provided directly to the worker and have a present cash value.

B. The Meaning Of "Wages" Must Be Consistent Within The Act.

The term "wages" is involved at two principal points in the determination of final benefits. The first step is that of calculating the particular worker's individual wage. But there is a second step, that of setting the overall benefit ceiling, in which the word "wage" is also crucial. The Act sets an absolute ceiling on benefits calculated as a percentage of "national average weekly wage."

The Act requires the Secretary of Labor to determine the national average weekly wage each year. 33 U.S.C. § 906(b)(3). If the worker is disabled, his maximum benefits cannot exceed 200% of the national average weekly wage. 33 U.S.C. § 906(b)(1)(D). Section 10 prescribes how the worker's "average weekly wage" is to be computed. 33 U.S.C. § 910. "National average weekly wage" is specifically defined to reflect the worker's national average weekly "*earnings*." Clearly, the term "earnings" does not connote sums that the worker does not and may never receive, and over which he has no

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[7] *See Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Equally applicable is the doctrine of *ejusdem generis*. *See United States* v. *Turkette*, 452 U.S. 576, 581 (1981).

Note that in this brief the term "fringe benefits" is generally avoided. The reason is that it is such a loose term that it can include some items like vacation pay, with definite cash value, that may be includable in the term "wages." Since trust fund contributions have no comparable cash value, it is more accurate to refer to them as precisely what they are, "trust fund contributions."

control. Moreover, "wage," "wages," "earnings" and "salary" are used interchangeably in the various subsections of Section 10. 33 U.S.C. § 910(a)-(f).

It would make little sense if "wage" or "wages" were to have one meaning in some sections of the Act and another in others. *See United States* v. *Cooper Corp.*, 312 U.S. 600, 606 (1941). This is particularly true where each worker's "average wages" and the "national average weekly wage" as determined by the Secretary are intertwined and interdependent within the same sections of the Act.

C. This Court's Construction Of "Wages" In Analogous Contexts Confirms This Result.

Not only does the plain meaning of "wages" as defined in the LHWCA demonstrate that fund contributions are excluded, but this Court's construction of that term in analogous contexts confirms that meaning. *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), is a case in point.[8] It was argued, in part, that unions bargained for fund contributions as though they were wages, and that industry considered them as an integral part of the wage package. The Court's answer was succinct:

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[8] The Court was dealing with the Bankruptcy Act, which awarded priority to "wages * * * due to workmen." 11 U.S.C. § 104(a)(2). The issue was whether contributions by an employer to a union welfare fund, required by a collective bargaining agreement, qualified as "wages." The argument, as here, was that since such contributions were paid on behalf of, and for the benefit of, the employee, it was irrelevant who paid them or to whom they were paid. The Court disagreed.

The Court also distinguished *United States ex rel. Sherman* v. *Carter*, 353 U.S. 210 (1957), which dealt with the requirement in the Miller Act, 40 U.S.C. §§ 270a-270d, that a contractor take out a payment bond "for the sum or sums justly due" each employee. The Court allowed recovery on the bond for delinquent contributions to a health and welfare fund. However, as pointed out in *Embassy Restaurant*, the opinion did not hold that such contributions were part of wages. 359 U.S. at 34-35. On the contrary, the Court in *Carter* specifically held that the Act did not "limit recovery on the statutory bond to 'wages'." 353 U.S. at 217.

"* * * we deal with a statute, not business practice." *Id.* at 33. Therefore, the Court concluded that the contributions were not "wages."

Among the Court's considerations were these: title to the funds was in the trustees; Congress had not specifically included such contributions, although it had amended the Bankruptcy Act on several occasions; the Act was intended to secure with some promptness for bankrupt employees the money directly due to them in back wages; and it was "evident that not all types of obligations due employees from their employers are regarded by Congress as being within the concept of wages, even though having some relation to employment." 359 U.S. at 31-32.[9] The same considerations apply to the LHWCA and to this case.

It can hardly be argued that the "wages * * * due to workmen" in *Embassy Restaurant* are different from "wages" in the instant case, as if the "wages" here are not due to workmen. This is particularly true where, as noted above, wages, earnings and salary are intermixed in the LHWCA. While it is certainly true that the same term may have different meanings in different statutes, it would be highly unlikely that the same term would have such widely diverse meanings as proposed here, with wages in one instance encompassing only direct payments to employees and wages in another incorporating all different types of payments to union trust funds by the employer.[10]

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[9] These are further reasons why the court below was in error in basing its decision partly upon the *Carter* case. Pet. App. at 11a-12a.

[10] One of the payments here was into a pension fund. In this regard, while *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977), dealt with a different subject (the Military Selective Service Act), some of its reasoning is instructive. At issue was whether an employee was to receive credit under his employer's pension plan for the period he spent in military service. The focus of the controversy was over whether the benefits under the plan were awarded for services rendered (and were thus akin to wages), in which case

D. Congress Knows How To Include These Benefits Explicitly When It Wishes To Do So.

It is significant that when Congress has intended fund contributions of this type to be included within the "wages" referred to in a statute, Congress has clearly manifested that intent in the plain language of the statute itself. For instance, in 1964 Congress amended the Davis-Bacon Act of 1931, ch. 411, 46 Stat. 1494 (codified at 40 U.S.C. § 276 *et seq.* (1976)), specifically to include such interests.[11] The same is true of the Bankruptcy Act

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they would not be an aspect of seniority covered by the Act, or whether they were in the nature of a reward for length of service, in which case they would be protected. The Court held that they were protected because they were not awarded for services rendered.

If a pension is a reward for length of service instead of compensation for the service itself, it is difficult to understand why employer payments into a union fund for the express purpose of ultimately providing the worker with a pension can be considered "wages" under the LHWCA.

[11] As amended, Section 276a now reads in part:

> (b) As used in Sections 276a to 276a-5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages," and "prevailing wages" shall include—
>
> (1) the basic hourly rate of pay; and
>
> (2) the amount of—
>
> (A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and
> (B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying

of 1978, Pub. L. No. 95-598, 92 Stat. 2583, which also explicitly includes employee trust funds as part of the "wages" referred to in the Act.[12] These statutes demonstrate that Congress is well aware of benefits such as those presented in this case, and uses language specifically referring to those benefits when it intends for them to be included within the "wages" defined elsewhere in an act. Coupled with the everyday meaning of the term "wages," Congress' failure specifically to include such benefits within the language of Section 2(13) of the LHWCA manifests Congress' intent to exclude them.

E. Liberal Construction Does Not Mean Disregarding The Act's Plain Meaning.

The court below relied in part on the concept that the LHWCA must be liberally construed in conformance with its humanitarian and compensatory purpose. Pet. App.

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costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits: * * * *

[12] (a) The following expenses and claims have priority in the following order:

* * * *

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance and sick leave pay * * *

(4) Fourth, allowed unsecured plans for contributions to employee benefit plans * * *.

Furthermore, Congress has adopted several statutes focusing directly upon the regulation of fringe benefit programs. For instance, in 1958 Congress adopted the Welfare and Pension Plan Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (codified at 29 U.S.C. § 302 *et seq.* (1976)) (superseded) in order to protect employee-pension plans. More recently, Congress has adopted the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 832 (codified at 29 U.S.C. § 1001 *et seq.* (1976)) and the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (codified at scattered sections of 29, 26, & 5 U.S.C.) to augment the protection afforded by the 1958 Act.

13a. As a general proposition, we agree with the concept. But it has no application here. Liberal construction has never meant that the courts must disregard plain statutory language or insert language which Congress has left out. *Director* v. *Rasmussen*, 440 U.S. 29, 46-47 (1979).

For example, in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 278-279 (1977), and *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 271 (1979), the Court did not seek to restrict the remedial LHWCA but at the same time felt compelled to reject a theory "that nowhere appears in the Act, that was never mentioned by Congress in the legislative process, [and] that does not comport with Congress' intent * * *." And in *Potomac Electric Power Co.* v. *Director*, 449 U.S. 268 (1980) ("*Pepco*"), the Court stated that the LHWCA must be liberally construed (449 U.S. at 281) but then went on to hold that such a construction does not warrant providing disabled employees with a complete remedy for their industrial injuries, since this is not what Congress intended. *Id.* at 281-282.[13]

Thus, even in interpreting the remedial LHWCA, this Court has adhered to the rule that " '[a]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive.' " *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 604 (1981) (insertions in the original). Where the meaning of the Act is plain, it "should be respected." *Id.* at 617.

II. THE DECISION BELOW DISREGARDS THE SPECIFIC PURPOSE OF THE CONCEPT OF "WAGE" IN A COMPENSATION ACT: RESTORATION OF A PORTION OF WHAT WAS RELIED ON FOR STANDARD OF LIVING, AND WAS ACTUALLY LOST.

The central fallacy in the opinion below is that it attempts to interpret "wages" in the abstract. It declares

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[13] *See also Voris* v. *Eikel*, 346 U.S. 328, 333 (1953), and *Baltimore & Phila. Steamboat Co.* v. *Norton*, 284 U.S. 408, 414-15 (1932).

the sole issue to be whether the fund contributions are a "value" that is "readily identifiable and calculable." It then works those words over as if it were writing a dictionary instead of a working rule in a total system designed for a definite practical purpose. What the court should have done was to realize that the purpose of calculating the worker's wage before his death is to restore a portion of *what his or her spouse has in fact lost by reason of the death*, in terms of what the family was accustomed to rely on to maintain its standard of living. Unlike most other social insurance systems, that pay flat-rate benefits, the American system has always attempted to key the benefit to past wages. The reason is not some notion that there is a legal right to a precise mathematical counterpart to some preinjury "values," whether identifiable and calculable or not. The reason is that at the time of injury or death, the family was living at a certain level represented by average wage, and the cash income benefit should be figured as a percentage of the wage on which the family actually lived.

Obviously, some tangible non-cash payments must also be included, such as board and room, and this statute expressly includes them, since these are indeed part of the standard of living and are indeed lost by the death or injury. But as to trust fund contributions, the fallacy is that, first, they do not form a part of the standard of living, and, second and more importantly, they are not in any meaningful sense lost as the result of the death or injury.

To sharpen this point, postulate that the contribution in question is for group life insurance—a very common type of fringe benefit. The worker is killed. In terms specifically of that contingent interest, what has the surviving spouse lost? Nothing. To the contrary, he or she has gained the face value of the life insurance. The same analysis can be repeated for almost all such contributions. Cessation of payments into union pension funds means nothing, because the deceased will never qualify for a pension. Cessation of payments for training is equally

meaningless. If these contributions are "wages," then why not the employer's contribution to Social Security?—a move that would dramatically increase the wage basis. The answer, again, is that by the deceased's death the surviving spouse, far from losing a "value," gains the survivor's benefits of the system. Why not unemployment insurance premiums? Again, nothing is lost. To reduce the whole matter to absurdity, one need only adduce another common plan—supplementary workers' compensation. The death or injury of the worker here actually confers the benefit that the premium payments only anticipated. If one adds to the face value of the supplemental compensation the value also of the insurance premiums used to purchase that supplemental compensation, one ends with the most preposterous kind of double payment.

III. THE LEGISLATIVE HISTORY OF THE LHWCA DEMONSTRATES THAT CONGRESS DID NOT INTEND TRUST FUND CONTRIBUTIONS TO BE INCLUDED IN "WAGES."

A. The *Pepco* Principle Controls This Case.

What is here called the "*Pepco* principle" may be paraphrased as follows: When Congress takes over intact a provision from a state act and enacts it into federal law, and when a particular interpretation of that provision at that time clearly "dominated the field," Congress must be deemed to have intended that interpretation.

In *Pepco*, decided only two Terms ago, the issue was a familiar one: are scheduled benefits exclusive? This Court, citing 4 *Larson*, § 58.23, noted that originally the exclusivity rule "did dominate the field," but also that in recent years there has developed a strong trend in the opposite direction, so that the non-exclusivity rule might well now be considered dominant. At this point, the Court could perhaps have said, "And, therefore, under the principle of liberal interpretation, we shall join this strong modern trend." But that is not what the Court

said. Rather, it concluded that the view dominating the field at the time of the statute's enactment must have been the rule that Congress intended.[14]

To carry over the *Pepco* principle to the present case, it is only necessary to note the undisputed fact[15] that union fund contributions of this kind have never at any relevant time in any jurisdiction been considered part of "wages" in calculating compensation benefits.[16] The most

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[14] * * * The relevant language was enacted in 1927. It was patterned after a similar "scheduled benefits" provision in the New York Workmen's Compensation Law enacted in 1922. A few years after enactment of the LHWCA, the New York Court of Appeals was confronted with the same question of construction under the New York statute that is now presented to us under the federal statute. The New York Court of Appeals apparently considered the statutory language so clear on its face that little discussion of this issue was necessary * * *.

Nothing in the original legislative history of the Federal Act or in the legislative history of subsequent amendments indicates that Congress did not intend the plain language of the federal statute to receive the same construction as the substantially identical language of its New York ancestor. [*Id.* at 275-276; footnotes omitted.]

* * *

Our task is to ascertain the congressional intent underlying the schedule benefit provisions enacted in 1927; we are not free to incorporate into those provisions subsequent state-law developments that we may consider sound as a matter of policy. In attempting to ascertain the legislative intent underlying a statute enacted over 50 years ago, the view that once "dominate[d] the field" is more enlightening than a recent state-law trend that has not motivated subsequent Congresses to amend the federal statute. The once dominant view is entirely consistent with a literal reading of the Act. [*Id.* at 280; footnote omitted.]

[15] This fact is admitted, for example, in the brief below of the Metropolitan Washington Council, AFL-CIO, at p. 7: "In fact, *Hilyer* takes away from employers an unjustified benefit *they have long been receiving* at the expense of their employees" (emphasis supplied).

[16] It should also be mentioned that, in the instant case, there has not even been a "recent trend" toward the Court of Appeals interpretation, as there was in *Pepco*.

direct evidence of this for purposes of the Longshoremen's Act is the longstanding and consistent interpretation of the Act by the Secretary of Labor, detailed in Part IV below. As to the law in New York and other states, there is not a single reported case, either at the time of the Act's passage, or at time prior to the 1972 amendment, holding that union fund contributions are includable as part of "wages." Respondent Hilyer's brief below, at 11-13, extracts from this history the curious argument that no federal court has ever held that such benefits should *not* be included. The obvious explanation is that, until very recently, the practice of not including them was so well settled that it simply would never have occurred to claimants or claimants' lawyers even to ask for them.

Equally curious is the reaction to the *Pepco* principle by the Ninth Circuit in *Duncanson-Harrelson Co.* v. *Director*,[17] a decision which followed the decision below and which thus became only the second federal decision in over 50 years to include union fund payments in "wages." After noting the argument of the Labor Department that this Court's decision in *Pepco* "supports the view that we must interpret the term 'wages' according to the definition that was commonly accepted in 1927," the Ninth Circuit added, "We disagree." [18] The court said:

> * * * [T]he Director insists we must apply a narrow definition of wages which excludes fringe benefits because when Congress enacted the statute in 1927 it would not have considered such benefits to be part of an employee's wages. * * * Although the concept of wages may have changed since 1927, we do not find that Congress intended an inflexible meaning of "wages" in the definition provided by section 902(13). * * * [*Id.* at 15a; footnote omitted.]

The Ninth Circuit did not cite any legislative history during any period of time, before or after 1927, for the

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[17] Decided September 14, 1982, and reprinted in an Appendix to Pet. Supp. Memo.

[18] Pet. Supp. Memo. at 15a-16a n.7.

proposition that Congress intended such an all-embracing definition of "wages" or that it had changed its mind after 1927. The reason is clear; there is no such legislative history, as we now demonstrate.

B. The Legislative History Of The Original Enactment.

Introduced on the floor of the Senate on February 17, 1926, the bill—S. 3170 or the Cummins Bill—that ultimately became the LHWCA was a companion to an identical bill introduced into the House the following day, H.R. 9498 or the Graham Bill. Each bill contained in Section 2(f) a definition of "wages" almost identical to the version adopted in Section 2(13).[19] Each bill was promptly referred to Committee, where over 20 witnesses from labor, industry, and the federal government testified.

No one suggested that the term "wages" in either bill included, or should be amended to include, fringe benefits or contingent interests. Most supporters of the bills simply expressed their desire for a compensation program covering longshoremen and the need for federal legislation. *E.g., Senate Hearings on S. 3170* at 18-19, 20-23, 41-42. Only two witnesses in the Senate hearings, who

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[19] Section 2(f) read as follows:

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

Compensation For Employees in Certain Maritime Employments: Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary, 69th Cong., 1st Sess. 1 (1926) (hereafter cited as *Senate Hearings on S. 3170*); *To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments: Hearing on H.R. 9498 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. 2 (1926).

As adopted, the statute substituted "injury" for "accident" to conform Section 2(13) to the definition of "injury" in Section 2(2).

opposed the bills, referred with any degree of specificity to the "wages" actually paid to longshoremen, and both used the term "wages" to refer to a longshoreman's take-home pay. *Senate Hearings on S. 3170* at 77, 80. No one challenged their interpretation or suggested that some other meaning was more appropriate. No one addressed the meaning of "wages" before the House Committee either. The only witnesses who referred to wages at all were concerned with the specific dollar amounts to be paid as "wages," not with the components of that term. *To Provide Compensation For Employees Injured and Dependents of Employees Killed in Certain Maritime Employments: Hearings on S. 3170 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. 139-140, 143, 149, 156-157 (1926). Everyone present assumed that a longshoreman's "wages" referred to his pay.

The bill reported by the Senate Committee did not use the definition of "wages" contained in the original bill introduced by Senator Cummins.[20] Instead, the amended version of S. 3170 proposed by the Judiciary Committee incorporated the benefits schedule contained in the Federal Employees' Compensation Act of 1916.[21] Like the existing federal program, the Committee's proposal calculated compensation awards on the basis of a worker's "average monthly pay," which did not include trust benefits as a measure of compensation.[22] Because the legisla-

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[20] *Compare Senate Hearings on S. 3170* at 1 (giving definition of "wages" in Section 2(f) of S. 3170, as introduced), *with* S. Rep. No. 973, 69th Cong., 1st Sess. 1 (1926) (omitting "wages" from list of definitions of amended bill).

[21] S. Rep. No. 973, *supra*, at 2-3 (reprinting Section 7 of Committee proposal); *id.* at 3 (reprinting Section 9 of Committee proposal).

[22] The Committee explained that it had amended S. 3170 in this fashion, not to introduce any novel compensation features, but because the adoption of the federal employees' compensation schedule "would be more equitable" for two reasons: "first, because the Federal commission is familiar with the administration of this law and there would be greater certainty of findings and decisions,"

tive history of the 1916 Federal Employees' Compensation Act contains no hint of the proposition that trust benefits were to be included in the compensation award,[23] it is clear that the Senate Judiciary Committee did not intend the LHWCA to include such benefits. Without debate, the Senate passed the bill, and sent it to the House.

The House Committee reported an amended version of S. 3170 that contained the definition of "wages" given in both of the original bills, as well as the original compensation schedule.[24] The Committee did not specify why it had substituted the definition of "wages" and the compensation schedule found in the original bills for the federal employees' compensation schedule adopted by the Senate. Presumably, the Committee did so because it continued to hold the view, as expressed in its Report on H.R. 9498, that the New York law, after which H.R. 9498 was patterned, was "one of the best."[25] In any event, the House Committee did not reject the Senate bill in order to adopt any compensation features unknown at that time. The House Report declared that the Committee's bill was designed to offer longshoremen "the same remedies" otherwise available under state law. H.R. Rep. No. 1767, 69th Cong., 2d Sess. 20 (1927).

The House Committee's version met with approval in both chambers. Discussion in the House was brief, and the House passed the Committee bill without amending

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and "second, because Congress is fairly familiar with the workings of the present Federal law and the passage of this much needed act would be facilitated." S. Rep. No. 973, *supra*, at 17.

[23] *See* H.R. Rep. No. 678, 64th Cong., 1st Sess. (1916); S. Rep. No. 733, 64th Cong., 1st Sess. (1916); H.R. Conf. Rep. No. 1195, 64th Cong., 1st Sess. (1916).

[24] H.R. Rep. No. 1767, 69th Cong., 2d Sess. 2 (1927) (proposed Section 2: definition of "wages"); *id.* at 4-5 (proposed Section 8: disability benefits); *id.* at 5-7 (proposed Section 9: death benefits).

[25] H.R. Rep. No. 1190, 69th Cong., 1st Sess. 2 (1926).

Section 2(13). No one questioned the meaning of the "wages" that were to serve as the basis for compensation.[26] The Senate accepted the House version of the LHWCA without any debate over the different compensation schedule, and passed the House bill the same day it was introduced. 68 Cong. Rec. 5909 (1927).

Respondent's position, and the decision of the Court of Appeals, that an employer's trust fund contributions are part of the "wages" recompensed under the Act finds no support in the legislative history. If the Congress that passed the Act understood "wages" to include such contributions—and it is the opinion of *that* Congress that counts, *Pepco*, *supra*, 449 U.S. at 280—then it is odd that nowhere in the legislative history is it even mentioned that longshoremen were to receive such benefits, their amount, how they were paid, and how they were to be calculated into the "wages" they were to receive. The text of the Act itself mentions several forms of remuneration other than straight pay, such as room and board. Union fund contributions, such as employer payments to pension plans, are nowhere mentioned in the text or legislative history because they were nowhere in existence, and because payment of these benefits would have subverted the purpose of limited compensation.

C. The Legislative History Of The Pre-1972 Amendments.

Congress increased the benefits levels on three different occasions between 1927 and 1972—in 1948, 1956, and 1961—to take into account increases in the cost of living.[27] None of these amendments, however, modified the defini-

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[26] Only two Representatives even spoke to the compensation afforded by the bill. 68 Cong. Rec. 5412-13 (1927) (remarks of Rep. O'Connor); *id.* at 5413-14 (remarks of Rep. Boylan). Neither discussed the term "wages."

[27] Act of June 24, 1948, ch. 623, 62 Stat. 602, 603; Act of July 26, 1956, ch. 735, 70 Stat. 654; Act of July 14, 1961, Pub. L. No. 87-87, 75 Stat. 203; The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251.

tion of "wages" to be used in fixing the new benefits levels. In fact, the House Report on the 1961 Amendment, for instance, stated that the benefits increase was designed simply to *"bring the benefit structure into line with the original intent of the act."* H.R. Rep. No. 57, 87th Cong., 1st Sess. 1-2 (1961) (emphasis added).

Each modification was premised upon a wage level reflecting the pay increases longshoremen had received in the interim, without any mention of any trust benefits that were also to be included.[28] Moreover, Congress' concern with offsetting inflation-caused increases in the cost of living, such as "the greater cost of providing proper and adequate child care under present-day conditions,"[29] demonstrates that Congress intended to increase only the dollar amount of compensation, without adding trust benefits to that increase. In addition, Congress also noted that, even with the increased awards, compensation payments would still be less than the income a longshoreman earned while employed,[30] a fact inconsistent with an award of trust benefits not paid out while a longshoreman was working. Finally, and most importantly, no one ever asked Congress to amend the definition of "wages" given in Section 2(13) of the original Act to include trust benefits. Labor representatives simply asked Congress to increase the dollar amount of compensation paid out under the Act, not the components

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[28] (1) *The 1948 Amendments*: S. Rep. No. 1315, 80th Cong., 2d Sess. 3 (1948); H.R. Rep. No. 2095, 80th Cong., 2d Sess. 3 (1948).

(2) *The 1956 Amendments*: S. Rep. No. 853, 84th Cong., 1st Sess. 2 (1955); H.R. Rep. No. 2067, 84th Cong., 2d Sess. 2, 3-4 (1956).

(3) *The 1961 Amendments*: H.R. Rep. No. 57, *supra*, at 1-2; S. Rep. No. 481, 87th Cong., 1st Sess. 2-3 (1961).

[29] S. Rep. No. 1315, *supra*, at 5; H.R. Rep. No. 2095, *supra*, at 7 (quoting and adopting Senate Report recommendation).

[30] *See, e.g.*, S. Rep. No. 853, *supra*, at 2.

of the "wages" upon which that compensation was calculated.[31]

Therefore, it is plain that, in these amendments, Congress did not explicitly or implicitly award disabled longshoremen or their dependents fringe benefits or contingent interests not contained in the "wages" defined in the original LHWCA.

D. The Legislative History Of The 1972 Amendments.

By far the most significant legislative history bearing on the present issue is that accompanying the massive amendments to the Longshoremen's Act in 1972. There are two principal reasons for this. One is that, by 1972, this kind of employer contribution to union funds was a

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[31] (1) *The 1948 Amendments: Longshoremen's And Harbor Workers' Compensation Act Amendments: Hearings on S. 2237 and Related Bills Before a Subcomm. of the Senate Comm. on Labor and Public Welfare*, 80th Cong., 2d Sess. 25, 32, 38, 66 (1948); *Amendments to the Longshoremen's And Harbor Workers' Compensation Act: Hearings on H.R. 5653, H.R. 5739, H.R. 6048, & H.R. 6647 Before Subcomm. No. 6 of the House Comm. on Education and Labor*, 80th Cong., 2d Sess. 5, 17, 22, 34 (1948).

(2) *The 1956 Amendments: Longshoremen's And Harbor Workers' Compensation Act: Hearings on Bills Relating to the Longshoremen's And Harbor Workers' Compensation Act Before A Special Subcomm. of the House Comm. on Education and Labor*, 84th Cong., 2d Sess. 27, 31, 32, 34, 35, 46, 94 (1956); *Longshoremen's And Harbor Workers' Compensation: Hearings on S. 594, S. 1307, S. 1308, S. 1646, & S. 2280 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 84th Cong., 1st Sess. 34, 40, 80 (1955).

(3) *The 1961 Amendments: Amendments to Longshoremen's And Harbor Workers' Compensation Act: Hearings on H.R. 6111, H.R. 7496, H.R. 8600, H.R. 9317, H.R. 9552, H.R. 9748, H.R. 10075, & H.R. 11714 Before the Subcomm. on Safety and Compensation of the House Comm. on Education and Labor*, 86th Cong., 1st Sess. 34, 59, 87, 105 (1960); *Amendments to Longshoremen's And Harbor Workers' Compensation Act: Hearings on S. 733 & H.R. 1258 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 87th Cong., 1st Sess. 13, 14 (1961).

conspicuous and widespread feature of employment in general and longshore employment in particular—so much so that it is inconceivable that an element of this magnitude would have been completely overlooked in the finely-tuned balancing of interests underlying these amendments. The other reason is that all parties to these amendments were intensely interested in the precise feature of the Act that would be affected by any radical change in the concept of "wage"—that is, the exact value of the compensation benefit level. This was because at the heart of the 1972 compromise was a trade-off of *Sieracki-Ryan* damage recoveries by longshoremen for greatly increased compensation benefits. In *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), this Court held that the virtual nonfault liability of a ship for unseaworthiness extended to longshoremen. This holding laid the groundwork for *Ryan Stevedoring Co.* v. *Pan-Altantic S.S. Corp.*, 350 U.S. 124 (1956), in which the Court held that a contract to perform stevedoring operations implied an agreement with the shipowner to perform these services in a workmanlike way, and a further agreement to indemnify the shipowner for any liabilities he might incur as result of failure to live up to this promise. *Id.* at 133-34. Ryan coincided with a marked expansion of the doctrine of unseaworthiness, extending it, for example, to conditions on dry land. *Thompson* v. *Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964). Indeed, this Court itself had expanded the concept to include assault by a fellow worker. *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955).

Because the net result, in most cases, shifted the full burden of the ship's liability to stevedore employer, there was mounting complaint that the employer's supposed immunity had been destroyed. Moreover, because of the shift from workers' compensation benefits to *Sieracki-Ryan* damage recoveries, there was little pressure to in-

crease compensation benefits, and they remained locked for years at $70 a week. The 1972 amendments immediately raised this figure to $167, and by January 1, 1982, by operation of the new "indexing" feature, the figure had reached $496.70. The *quid pro quo* for this dramatic increase was the abolition of both the *Sieracki* and the *Ryan* doctrines.

For present purposes, the important point is that this *quid pro quo* was the result of a careful balancing of gains and losses with measurable dollar values. Can anyone imagine that Congress—or any of the parties—also intended a redefinition of "wage" that might well have increased the longshoreman's benefits and the employer's costs by, say, 40 percent? Suppose the matter had been brought out in the open, and the longshoremen had proposed a formal redefinition of "wage" to include union fund contributions. Obviously, there would have been elaborate calculations and discussions, both by the parties and by Congressmen, as to what the dollar value and cost of this change would be, and how it would affect the balancing of interests involved. The same would have been equally true if, without an overt amendment proposal, it had ever occurred to anyone that such a change in the meaning of "wage" had somehow taken place *sub silentio* over the years.

This is why it is so crucially significant that, despite testimony from dozens of interested parties, filling over one thousand pages of hearing transcripts, discussing every perceived flaw in the existing Act, *no one ever suggested that the "wages" payable under the Act did or ought to reflect an employer's pension or welfare fund contributions.* In every instance in which the discussion centered around the wages payable as compensation, witnesses either explicitly or implicitly used the term "wages" to refer to pay; moreover, there was no testimony concerning union fund contributions in the evidence presented to

the Senate and House Committees demonstrating the need for higher compensation awards.[32]

Labor representatives uniformly criticized the maximum and minimum compensation levels set by the 1961 amendments on the ground that they were unrealistically low in light of the inflation and wage increases that had taken effect since then. For instance, Howard McGuigan, Legislative Representative of the AFL-CIO, testified that the $70 per week maximum, based, as it was, upon a $105 average weekly wage, had become outdated the year after it was adopted.[33] Consequently, "the current maximum weekly benefit available to an injured worker and his family under the Longshoremen's Act is less than the Department of Labor designated poverty level of income for a nonfarm, four-member family." [34]

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[32] *Longshoremen's And Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525, & S. 1547 Before a Subcomm. on Labor of the Senate Comm. on Labor and the Public Welfare*, 92d Cong., 2d Sess. 61-63, 66-67, 68, 78-81, 87-88, 98 (Table I), 99 (Table II), 101 (Table IV) (1972) (hereafter cited as *1972 Senate Hearings*) (testimony and written statement of Howard McGuigan, Legislative Representative, AFL-CIO); *id.* at 147-149 (statement of Everett Ede, Former President of Local 8, ILWU); *id.* at 171, 183 (statement of Ralph Hartman, Bethlehem Steel Corp.); *id.* at 617 (statement of Rep. Burton); *id.* at 640 (statement of Chester Eschen, Jr., President of California Stevedore & Ballast Co.); *id.* at 676 (statement of Everett Ede); *id.* at 690-94 (Table) (statement of Frank Bonadio, President of Building & Construction Trades Dep't, AFL-CIO); *Longshoremen's And Harbor Workers' Compensation Act: Hearings on H.R. 247, H.R. 3505, H.R. 12006, & H.R. 15023 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 68-69 (1972) (hereafter cited as *1972 House Hearings*) (statement of Ralph Hartman); *id.* at 245 (statement of Frank Bonadio); *id.* at 256-58, 261, 266 (Table I), 267 (Tables II & IV), 282; *id.* at 295 (statement of Thomas Gleason, ILA, AFL-CIO); *id.* at 296-98 (statement of Joseph Leonard, Safety Director, ILA).

[33] *1972 Senate Hearings* at 61, 98 (Table I).

[34] *Id.* at 62. Everett Ede, former president of a local chapter of the ICA and active longshoreman himself, identified, quite

To remedy these shortcomings, labor representatives sought an increase in the dollar amount of compensation offered, in a variety of categories, as well as the elimination of benefit ceilings. Were Congress to enact these recommendations, they testified, the LHWCA would again be able to serve its purpose of preventing the pauperization of disabled longshoremen.[35] No one, however, asked Congress to alter the basis upon which compensation

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bluntly, the reason why the current compensation provisions were insufficient—compensation awards failed to approach preinjury take-home pay:

> When a longshoreman is injured—what happens? I don't mean what technical procedures are followed—I mean what happens psychologically to this worker and his family, even aside from the worries regarding his physical well-being? He, the workman, has been earning $190 to $210 a week bring-home money, and like most wage earners, lives from paycheck to paycheck. They have bills to pay, house payments, lights, phone, water, furniture, car, insurance, clothes, fuel, taxes, food, and children to educate. That "sure, swift, adequate compensation" isn't automatic. Reports are made, claims are filed, and in some weeks he could get a check—but not $190 a week—$70 a week, and they *almost* have enough to eat on. [*Id.* at 675, 676 (emphasis in original).]

[35] Joseph H. Koonz, Jr., former Chairman of the District of Columbia Bar Association's Subcommittee on Workmen's Compensation, explicitly portrayed the purpose of the proposed benefits increase in this light:

> In the District of Columbia in 1971, the average weekly wage of all insured employees was $152. * * * Since the average worker earns a minimum in excess of twice the weekly benefits now provided under the law, this worker, when injured, cannot and does not meet his financial commitments for housing, food, clothing, etc. on $70 a week. Consequently, he must turn to other sources for financial help. This means public assistance, welfare, charity, from whatever source is available to him. This depletes the funds that were not created for this purpose, thus depriving other needy citizens of these funds, and also destroys the injured worker's dignity, making him a partial ward of the community. This situation, which I have seen occur time after time in my practice, is one which would not exist if compensation benefits were adequate. [*1972 Senate Hearings* at 167.]

awards were to be calculated. The "wages" identified by labor representatives as being unreasonably low were, in each instance, the pay that longshoremen received, without counting any union fund contributions that might have been made. Indeed, their repeated pleas for some means of relieving disabled longshoremen or their dependents for relief from the poverty into which they had fallen can only be read as referring to their lost pay because it was, according to their testimony, the growth of take-home wages, not the expansion of union fund contributions that had outstripped compensation.

Responding to these pleas, Congress "raise[d] benefits to a level commensurate with present day *salaries* and with the needs of injured workers whose sole support will be payments under the Act." S. Rep. No. 1125, 92nd Cong., 2d Sess. 5 (1972) (emphasis added). *See* H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1 (1972). Disability and survivor benefits had historically been set at 66⅔% of a longshoreman's average weekly wages in order to avoid overcompensating highly paid workers, and were also subject to a fixed dollar amount as the maximum award. *Id.* at 2. But, owing to wage increases, the maximum benefit award had become outdated and left most longshoremen with an award that failed to approach their employment pay. *Id.* at 1, 2; S. Rep. No. 1125, *supra*, at 4. Rather than simply once again fix a higher maximum amount, Congress eliminated any set figure in favor of permitting the maximum award to rise in accordance with twice the national average weekly wage calculated by the Secretary of Labor. By doing so, Congress hoped to ensure that virtually all longshoremen would receive ⅔ of their average weekly wage without the need for periodic congressional revisions. *See* H.R. Rep. No. 1441, *supra*, at 3; S. Rep. No. 1125, *supra*, at 5. The legislative history demonstrates that, through these amendments, Congress expected that longshoremen would consistently be able to obtain the same type of wage benefits that

Congress had anticipated when it first enacted the LHWCA.

By 1972, Congress was well aware of the existence of fund contributions, having amended the Davis-Bacon Act in 1964 specifically to include employer pension fund and other trust benefit contributions within the meaning of "wages" in that Act, originally passed in 1931. *See* S. Rep. No. 963, 88th Cong., 2d Sess. 1-2 (1964). No one suggested, however, that the LHWCA ought to be revised to take such contributions into account. "This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds* v. *Compagnie Generale Transatlantique, supra*, 443 U.S. at 266-267.

This silence was not an accidental oversight. Modifying the components of the "wages" upon which compensation was based was not only unrequested, it was unnecessary. By coupling the adjustment formula to the higher level of benefits, Congress was able to provide longshoremen with their sought-after benefits increase as well as ensure that the state of affairs existing in 1972 would not be repeated. At the same time, Congress was aware that it could provide this benefits increase without imposing any substantial additional costs upon shipowners or stevedores by eliminating the *Sieracki* and *Ryan Stevedoring* doctrines.[36] In other words, Congress was able to accommodate the interests of all parties in the manner it did without needing to alter the historically understood basis

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[36] Several persons stated that the elimination of the *Sieracki* and *Ryan Stevedoring* doctrines would permit Congress to increase the compensation awarded under the Act without leading to a substantial increase in insurance premiums. *See, e.g., 1972 Senate Hearings* at 720 (letter of June 2, 1972, from Braxton Carr, President of American Waterways Operators, Inc., to Sen. Williams); *1972 House Hearings* at 93-94 (statement of James Flynn, representing New York Shipping Assoc., Inc., and National Maritime Compensation Comm.).

upon which the new compensation awards would be calculated.

That Congress did not even consider revising the definition of "wages" in 1972 despite legislating a massive benefits increase—and that Congress had never considered revising Section 2(13) prior to the decision below[37]—is the capstone of an unbroken historical consensus that the definition of wages given in Section 2(13) of the original LHWCA and unaltered since its inception does not now and never has included fund contributions such as those at issue in this case.

IV. THE DEPARTMENT OF LABOR, THE AGENCY CHARGED WITH ADMINISTRATION OF THE LHWCA, HAS CONSISTENTLY TAKEN THE POSITION THAT TRUST FUND CONTRIBUTIONS ARE NOT WITHIN THE "WAGES" DEFINED IN THE ACT.

The Department of Labor has been interpreting the term "wages" in state and Federal workers' compensation statutes for over 70 years and, with the exception of its position before the District of Columbia Circuit,[38]

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[37] As we pointed out in our Reply Brief in support of the Petition (Pet. Reply at 3 n.1), the Senate has recently passed a bill—which, on this point, was unopposed by Amicus AFL-CIO or any other labor representative (*id.*)—that would effectively overrule the decision below. 128 Cong. Rec. S912 (daily ed. July 27, 1982) (reprinting amendment to Section 2(13) as adopted). However, this bill, even if enacted by the House, would not apply to this case. By its terms, the bill adopted by the Senate is applicable (with certain exceptions not relevant here) only to "an injury, disability, or death which occurs or commences on or after the date of enactment of this Act * * *." 128 Cong. Rec. S9216-17 (daily ed. July 27, 1982) (Section 25: effective date). Moreover, there is no indication when or whether this bill will come up for a vote in the House and be signed by the President.

[38] The only exception to this consistent, long-standing interpretation was the position taken by the Director of the Office of Workers' Compensation Programs before the District of Columbia Circuit in

the Department has never interpreted "wages" to include employer trust fund contributions. Significantly, the Department's construction was evident at the time Congress enacted the LHWCA. Several witnesses from the Department of Labor testified during the Congressional hearings on the LHWCA, and none suggested that the "wages" defined in Section 2(f) of the Cummins-Graham Bills included fringe benefits or contingent interests.[39]

Since the adoption of the LHWCA, the Secretary has never suggested that the LHWCA offered compensation for lost fund contributions. In fact, in 1968 the Associate Solicitor of the Department of Labor concluded that " 'it would be improper to assert the inclusion of pension and health plan contributions by the employer in computing wages * * *' "[40] because Congress never contemplated

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the litigation of this case, a position that the Department of Labor has now concluded was incorrect and has abandoned in this and all other cases involving this question. *See* Fed. Br. at 4 n.2. Accordingly, the administrative construction of the term "wages" carries with it not only the weight of a longstanding interpretation but also the benefit of a contemporary re-examination. *See Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).

[39] *See Senate Hearings on S. 3170* at 40 (statement of L.B. Clark, U.S. Bureau of Labor Statistics); *id.* at 43 (statement of Bessie Breggeman, Chairman, United States Employees' Compensation Commission); *id.* at 44 (statement of Charles Verrill, Member, United States Employees' Compensation Commission).

[40] Bureau of Employees' Compensation, Wage and Labor Standards Administration, U.S. Department of Labor, *LS/HW Program Memorandum No. 32* (June 17, 1968) (reprinted at AIA Br. App. 1a) (quoting Associate Solicitor's Advisory Opinion of Mar. 18, 1968). To be sure, the Associate Solicitor did go on to state that there was "support for including such contributions in wages." But in so doing, the Associate Solicitor did not refer to legislative history of the original LHWCA or any of its amendments, but referred instead to *other* statutes (and interpretative decisions) some of which were enacted *after* the adoption of the LHWCA. *Id.* at 2a-4a (referring to National Labor Relations Act, amendments to the Davis-Bacon Act, the Bankruptcy Act, and the Fair Labor Standards Act). The Associate Solicitor's opinion, therefore, must be read to

that such contributions would be included.[41] Thus, the Department of Labor has construed the Act to mean that such contributions form no part of wages. It has also concluded that the Congressional intent under Section 2(13) was to exclude these contributions, and, quite properly, it considers itself bound by that intent.

The Department of Labor has continued to adhere to this interpretation since its 1968 opinion when carrying out its responsibilities under Section 5(b)(3) of the 1972 Amendments, 86 Stat. 1252 (codified at 33 U.S.C. § 906 (b)(3)), to calculate the "national average weekly wage." The Secretary has never included the type of union fund contributions identified as wages by the Court of Appeals in that calculation. In fact, the Longshore Procedure Manual of the Department of Labor, used to calculate "wages" and the appropriate benefits, explicitly excepts an employer's contributions to pension and health plans, in accordance with the 1968 interpretation of the Solicitor of Labor. Alliance Br. App. C.[42]

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conclude that nothing in the LHWCA or its legislative history by themselves support the construction of "wages" accepted by the Court of Appeals.

[41] As the Associate Solicitor concluded:

> In 1927, when the Longshore Act was enacted, one rarely heard of private welfare and pension funds to provide group life insurance, hospital and medical care, and pensions. These fringe benefits developed during World War II and expanded greatly thereafter. Since we feel bound by past practice of excluding these fringe benefit contributions from wages, it is up to Congress to provide a realistic definition of wages which will correspond to current wage customs and practices. [*Id.* at 4a.]

[42] Moreover, the Benefits Review Board, the administrative body of the Department of Labor that hears appeals from the decision of the administrative law judge in all LHWCA cases, uniformly rejected attempts to include fund contributions within "wages" prior to the decision below. *See Collins* v. *Todd Shipyards Corp.*, 5 B.R.B.S. 334 (1977); *Lawson* v. *Atlantic & Gulf Grain Stevedores Co.*, 6 B.R.B.S. 770 (1977); *Hilyer* v. *Morrison-Knudsen Construction Co.*, 6 B.R.B.S. 754 (1977), *aff'd in part, rev'd in part, and*

This Court has held on numerous occasions that a reasonable interpretation of a statute by an agency charged with its administration is entitled to substantial deference. *E.g.*, *Schweiker* v. *Hogan*, 102 S. Ct. 2597, 2609 (1982); *United States* v. *Clark*, 102 S. Ct. 805, 811 (1982); *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 177, 189-190 (1981). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) ("*FEC* v. *DSCC*"); *see Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). In this case, all of the factors to be considered when evaluating an agency's interpretation—"the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control," *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *see FEC* v. *DSCC*, *supra*, 454 U.S. at 37—apply here and weigh in favor of the interpretation proposed by petitioners and the Department of Labor.[43]

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remanded, 216 U.S. App. D.C. 50, 670 F.2d 208 (1981), *cert. granted*, No. 81-1891 (Oct. 4, 1982); *Freer* v. *Duncanson-Harrelson Co.*, 9 B.R.B.S. 888 (1979), *aff'd in part, rev'd in part, and remanded sub nom. Duncanson-Harrelson Co.* v. *Director*, 686 F.2d 1336 (9th Cir. 1982); *Waters & Levis* v. *Farmers Export Co.*, Nos. 79-329A & 79-330A (June 12, 1981), appeal pending Nos. 81-4258 & 81-4273 (5th Cir.), decision withheld pending action by this Court (June 9, 1982) (minute entry by Clerk of Court). *See also Barber* v. *Tri-State Terminals, Inc.*, 3 B.R.B.S. 244 (1976) (unemployment benefits). The Benefits Review Board came to the contrary conclusion in *Minick* v. *Levin Metals Corp.*, No. 80-835 B.R.B. (April 28, 1982), only by compulsion of the decision below, but the Board has granted a motion for reconsideration in that case.

[43] The Department of Labor is also not the only federal agency to conclude that "wages" do not include union fund contributions. The Comptroller General and the General Accounting Office also hold

Thus, the consistent and longstanding interpretation of "wages" reached by the Department of Labor is fully consistent with the plain meaning of the LHWCA and its legislative history, and, as discussed below, has generated substantial, legitimate reliance by the private sector. That interpretation should be upheld by this Court.

V. THE PRACTICAL EFFECT OF THE DECISION BELOW WOULD BE DEVASTATING, VASTLY INCREASING COSTS AND OTHERWISE SUBVERTING THE PURPOSES OF THE ACT.

A. The Decision Below Frustrates The Settled Expectations Of All Parties.

In reliance on the universally-accepted definition of "wages" which has governed the operation of the LHWCA since its adoption, the parties affected by the Act have for over 50 years confidently ordered their dealings and conduct accordingly. These parties include, among others,

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that view. In a recent study examining the flaws in the existing LHWCA, the Comptroller General stated that "[t]he act provides for total disability compensation benefits, subject to minimums and a maximum, of 66 2/3 percent of *gross pay*." Report by the Comptroller General of the United States, General Accounting Office, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending*, HRD-82-25, at p. 13 (April 1, 1982) (hereafter cited as *Comptroller General's Report*) (emphasis added). The Comptroller General's analysis of the compensation currently provided by the Act was based entirely upon a comparison between a longshoreman's gross and take-home pay while fully employed and the percentage of both that a disabled harbor worker will receive under the benefits provisions of the Act. *Id.* at 13-17. In fact, one of his major criticisms of the current compensation provisions of the Act is that they overcompensate disabled workers by failing to take into consideration the money a disabled harbor worker receives during disability from sources such as "employee benefit plans subject to the Employee Retirement Income Security Act of 1974." *Id.* at 17. Therefore, the Comptroller General—who, based upon his consideration of pay-based compensation alone, concluded that the LHWCA currently overcompensates disabled longshoremen (*id.* at 13-17, 26)—also clearly does not consider "wages" to include union fund contributions.

the workers and their unions, the employers, the insurance companies which provide coverage for those employers and, finally, the administrative and judicial entities which must ensure fair, expeditious enforcement of the Act. At no time during this long period did any of these parties ever treat union fund contributions as wages. Indeed, prior to 1977, to our knowledge no party had even suggested to the Benefits Review Board or in court that such contributions should be included, and, until the decision below, the unanimous opinion since 1977 had been that they were not. In such a situation, this Court has made clear that the "settled expectations" of the affected parties should be carefully weighed in construing the Act. *J.W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978); *cf. Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-458 (1978).

B. The Decision Below Will Produce An Extreme Increase In Costs.

In this case, the novel construction of the Act reached below not only is contrary to the parties' reasonable and well-settled expectations but will also defeat Congress' purpose to provide a quick, effective remedy following accidents and will entail enormous, destabilizing costs which were never contemplated by Congress.

In order to make plain the impact of the decision below, it will be helpful first to describe how, in practice, the LHWCA currently operates, as made clear by considerable recent data.

By 1981, according to Department of Labor estimates, approximately 905,000 employees were covered by the Act and its extensions (including the District of Columbia), an increase of over 100,000 since 1972. The number of reported injuries has increased from roughly 72,000 in 1972 to 238,000 in fiscal year 1980 and 251,000 in 1981, with the number of cases in which employees have ac-

tually lost time from work because of disability increasing from over 17,000 in 1972 to 59,000 and 61,000 in 1980 and 1981, respectively.[44]

The costs associated with these injuries is considerable and rapidly increasing. The Department of Labor estimates that the cost of compensation and medical benefits paid by employers and insurance carriers rose from $33 million in 1972 to $220 million in 1980. *Comptroller General's Report* at 5. The United States Chamber of Commerce has also estimated that employers' compensation costs have risen 6 times faster than wages since 1971.[45] For instance, in the shipbuilding industry, employers' costs under the LHWCA increased in the 10-year period between 1970 and 1980 by 851% even though wages increased only 124% over the same period. *Id.*

Current maritime-worker compensation costs dwarf the cost of compensation for other employees. The annual cost of insuring a longshoreman in 1981 was $21,000 (even though the average annual salary was only $24,000), while the annual cost under New York law for insuring a non-longshore freight-handling worker was only $3,370, and the annual cost for insuring a police officer and fireman was $1,042 and $1,254, respectively.[46] The average cost of providing LHWCA compensation pro-

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[44] *Comptroller General's Report* at 5; United States Department of Labor, 1983 Budget Justification of Appropriations Estimates for the Committee on Appropriations (Jan. 1982), ESA-33 (Table II of Longshoremen's and Harbor Workers' Compensation Act Workload Statistics FY1981-FY1983) (hereafter cited as *1983 Labor Budget*).

[45] *Longshoremen's And Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 1129 (1981) (statement by Eric Oxfeld, Employee Benefits Attorney, Chamber of Commerce of the United States) (hereafter cited as *1981 Senate Hearings*).

[46] *1981 Senate Hearings* at 1129.

tection equalled 50% of an employer's total payroll, as compared with the average for all industries of 1.5%.[47]

According to the Comptroller and studies commissioned by the Department of Labor, these currently exorbitant insurance costs are attributable, among other things, to "high accident rates" and to the "very liberal benefits" under the program. *Comptroller General's Report* at 8, 9. The result has been that some employers have sought lower-cost protection from less reliable carriers, while others have simply become self-insurers. *Id.*

The process by which benefits are awarded begins when a worker or his survivor files a claim for benefits. If the employer accepts an employee's benefits claim, it simply pays the compensation due under the Act; if not, the employer may seek adjudication of the claim at a Department of Labor district office. *Comptroller General's Report* at 4. According to the Comptroller General, 96 percent of all claims are settled at such district offices; only 4 percent reach the Office of Administrative Law Judges, of which only half are tried; 1 percent are reviewed by the Department's Benefits Review Board, and only 0.1 percent are heard thereafter by the United States Courts of Appeals. *Id.* at 5.

So long as claims under the Act are clear and undisputed, the delivery of the described benefits presents no problems. However, where disputes occur, and formal or informal adjudication is required, the system is not equipped to function expeditiously: backlogs in disputed cases run over 200 cases per claims examiner (for a total of over 11,500 at the end of fiscal year 1980), and decisions by the Board of Review are expected to require 2.5 years from the date of filing. *Id.* at 32, 42.

Nevertheless, the described current system of delivering compensation under the LHWCA, although costly and

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[47] *Id.* at 2 (statement of Sen. Nickles); *id.* at 25 (statement of Sen. Hatch).

administratively strained, is generally functioning as Congress intended, *i.e.*, for the most part it is delivering limited but certain sums in a timely manner to meet the basic needs of injured workers and their dependents. All this will change if the decision below is upheld; the practical consequences of that decision will cripple the system as it stands today.

The first and immediate effect of the decision below will of course be to increase employers' insurance premiums, self-insurers' obligations, and insurance company liabilities. While the exact amount and content of these increases is far from clear, one thing is certain: they will be staggering. Recent trade journal estimates and data gathered and presented to this Court by various *amici* show that certain collectively-bargained-for contributions are on average a minimum of $4 per hour, an amount which is at least one-third of the previously-understood definition of "wages" ("straight-time" pay received by the workers).[48] Conservatively assuming only a 30% increase in "wages" and considering that there were 50,000-60,000 claims for the year 1980, incremental payments of $60 million would have been in order for that year alone.[49] The increased payments for 1981, 1982, and 1983 would of course be greater, owing to the higher number of claims for those years,[50] and the inevitably increased "wages" costs. Plainly, even if the total-dollar increase could be limited to the 1980-1983 period, it would be at least in the hundreds of millions.

Unfortunately, it is not at all clear that the increase can be so limited. Awards under the Act may be modified

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[48] *Business Insurance*, pp. 1, 31 (Feb. 8, 1982); Ship. Br. at 4-5; Steve. Br. at 11; Alliance Br. at 11.

[49] *See* Alliance Br. at 11.

[50] The figure for 1981, excluding the District of Columbia, was 61,000 claims, and the Department of Labor estimates the 1982 and 1983 figures at 67,000 and 73,000. *1983 Labor Budget* at ESA-33.

up to one year after the last compensation payment is made in order to permit the correction of a "mistake in a determination of fact." 30 U.S.C. § 922. If the arithmetical calculation of "wages" mistakenly omitted fund contributions, and particularly since this Court has determined that modification remedies in such circumstances should be broadly construed (*O'Keeffe* v. *Aerojet General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)), the risk is great that the decision below could be held retroactive. In fact, where no final order to pay benefits has been issued, claims remain forever open to redetermination. *Intercounty Construction Co.* v. *Walter*, 422 U.S. 1 (1975). Since nearly all (96%) longshore claims are "resolved" at the district office level, and since officials at that level have had no authority since 1972 to issue final orders as to those claims, all such claims may be reopened if "wages" are now held to include fund contributions.

It would be difficult to overestimate the pernicious implications of such an outcome upon the affected parties. First, employers' costs will necessarily skyrocket, perhaps by *more* than the value of the newly-added fund contributions. This will happen because the ceiling on benefits under the LHWCA, as previously described, is *twice* the "national average weekly wage." 33 U.S.C. § 906(b)(1)(D). Hence, since the "national average weekly wage" might have to be recomputed by the Department of Labor to include fund contributions, and assuming that "wages" rose by a figure which has been conservatively estimated to be more than 30%, the maximum payout to injured workers would be increased by a greater percentage due to the raising of the statutory ceiling. The shock of this total increase, particularly if it is retroactive, would obviously be more than some employers can survive, particularly those who act as self-insurers.

Those who do survive will face enormous one-time payouts of windfall retroactive benefits, along with either substantially increased insurance premiums (for those

who can afford, and still obtain, insurance), or substantially increased payout obligations (in the case of those who can or must act as self-insurers). For their part, insurance companies will face fantastic liability for greatly increased obligations for which they never collected premiums; and, for the future, substantial additional reserves will be required along with extensive rate-setting procedures to establish new, higher premiums.[51]

Moreover, increasing an employer's insurance premiums without also increasing either his employees' productivity or the demand for their services will simply serve to increase the employer's cost of running his business. If an employer's fund contributions are a substitute for "higher straight pay" that otherwise would be tendered to employees—as the AFL-CIO has asserted in its amicus brief[52]—then increasing an employer's insurance premiums must logically lead to lower straight pay for all longshoremen, or, alternatively, it must lead to layoffs in the number of longshoremen employed. It would, in other words, price some longshoremen out of their livelihood, along with their employers.[53]

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[51] AIA Br. at 16-18.

[52] AFL-CIO Br. at 5.

[53] There is also evidence indicating that the new "wages" benefits announced by the Court of Appeals will lead to an increase in the rate of accidents suffered by longshoremen. The Report by the Comptroller General stated that:

> [e]vidence from private, long-term disability insurance programs indicates that high compensation rates cause disability incidence rates to increase. Private insurance plans with compensation rates over 70 percent of predisability gross income have incidence rates two-thirds above the average, while plans with compensation of 50 percent or less have incident rates one-third below the average. Because of this, private insurers generally attempt to limit disability benefits to 50 to 60 percent of gross earings. [*Comptroller General's Report* at 14.]

C. The Decision Below Will Raise Benefits Above Actual Wages.

Disabled workers (or their dependents) will, if the decision below stands, in most cases receive greater income after disability (or death) than they received while fully employed. The current compensation approaches that result already. The Comptroller General recently stated that "[a] March 1980 [Department of] Labor survey * * * showed that compensation under the act, on the average, equalled 88 percent of preinjury take-home pay." *Comptroller General's Report* at 13. This is due, in large part, to the fact that compensation awards are tax-free while take-home pay is not. *Id.* at 13-14 & n.1. But it is also due to the fact that compensation under the Act is not entirely or sometimes even partially offset by collateral benefits available from other federal legislation, such as the Social Security Disability Insurance Program, or private pension or welfare programs, like those presented in this case. *Id.* at 14-15. "In some cases, payments from other sources, combined with workers' compensation, could result in payments that exceed preinjury net earnings." *Id.* at 26; *see id.* at 14-15 (describing how this will occur under the International Longshoremen's Association's guaranteed annual income program).

If, then, we start with merely the 88 percent of take-home pay as the present average benefit level, and increase this by one-third for the impact of the decision below (*see* n. 48 *supra*), we end with a total benefit that is 121 percent of previous wage.

Another example of how this would occur results from the current collective bargaining agreement governing work by members of the International Longshoremen's Association in the Atlantic and Gulf Coast ports. This agreement, which is midway through its three-year term, currently provides for a $12.80 basic hourly wage, plus $4.59 per hour of work to be paid into pension, health

and welfare funds. (Locally negotiated trust benefits and those required by law are extra.)

Assuming a 40-hour work week, the longshoreman's actual wages would be $512.00. In the case of total disability under the LHWCA, the compensation rate (at 66⅔%) would be $341.32. However, if the contract fringe benefits were to be included in the computation, the base upon which the compensation rate would be applied rises to $695.60 and would yield a weekly compensation rate of $463.72, or nearly 90% of actual pre-injury wages, tax-free. This would yield a post-injury income of about $24,100 per year, or about $3,900 *more* than the pre-injury spendable income (gross wage minus Federal and State taxes and FICA) of $20,200. Thus, any economic incentive to return to work would be eliminated.

Congress never intended such a result; the benefit provisions explicitly guarantee only a fraction of "wages" as compensation. Moreover, this result is expressly contrary to one of Congress' objectives in setting compensation lower than full employment income—encouraging recovery and return to work. *See* H.R. Rep. No. 678, *supra* at 9 ("It is obvious that to grant a man full pay while disabled will tend to induce him to malinger * * *").[54]

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[54] *Id.* at 13 ("With a reduction of the rate of compensation to two-thirds of the pay, and the limitation of $66 2/3 [sic: 66 2/3%] as the monthly maximum amount that any workman could receive as compensation, regardless of the amount that he may be receiving as earnings when employed, there would be afforded a degree of stimulus to return to work, while the opportunity of continuing unemployment without loss of pay would be withdrawn").

Although these comments were made in the House Report on the 1916 Federal Employees Compensation Act, Congress adopted the same maximum compensation percentage in the LHWCA, demonstrating its intent to deter harbor workers from malingering as well.

D. The Decision Below Could Extend To All Kinds Of Employee Perquisites, Benefits, And Privileges.

The case before the Court happens to involve three particular kinds of union fund contributions, and up to this point we have phrased our arguments in terms of these particular categories. But once the definition of "wages" that has stood for 55 years is abandoned by recognition of these three categories of benefits as part of "wages," attempts will inevitably be made to extend this new concept to every conceivable kind of fringe benefit. Moreover, since most of the arguments for the extension are the same, the attempts would probably be successful in most cases. Thus, if the test is, in the words of the Court of Appeals, "*all* of the identifiable value, in whatever form it may appear," "wages" could soon come to include group term life insurance policies; medical or dental reimbursement plans; pension plans; profit-sharing plans; continuing educational programs; travel allowances to professional conferences, meetings, and seminars; unemployment compensation insurance; matching contributions to educational or charitable associations; civic furlough programs; personal or pregnancy leaves; alcohol or drug rehabilitation programs; savings plans; stock option plans; employer-subsidized cafeterias; discounts on company products; productivity or length-of-service bonuses; wage advances; and staggered hours and "flex-time" options. S. Slichter, J. Healy, & E. Livernash, *The Impact of Collective Bargaining on Management* 440-441 (1960). Even such trivial items as uniforms, equipment, and free parking might have to be included, so long as there was some understanding reached with the worker that those would be provided "in return for his labor." [55] Pet. App. at 13a.

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[55] It is true, of course, that the statute requires the "wages" received by the employer to be "recompensed under the contract of hiring in force at the time of the injury * * *." But basic contract principles impose no requirement that a contract either be reduced to writing or be limited to a specific subject. 1 *Corbin on Contracts* § 3, pp. 5-8 (1963); 1 S. Williston, *A Treatise on the Law of Contracts*, § 1, pp. 1-4 (3d ed. 1957 & Supp. 1982); *Restatement* (*Sec-*

Indeed, under the lower court's view, there are arguably as many items that should be included within "wages" as there are facets of a job that could attract an employee to choose one position over another.[56] Because employees often select jobs based on benefits such as these, they may legitimately claim that these benefits were worth more to them than the higher straight-time salary offered on another job. Such benefits—"in whatever form [they] may appear"—are of some "value" to the employee, who presumably chose his current position because he valued these benefits at an amount greater than the pay or other benefits offered by alternative employment. Thus, even where an employee finds it difficult to put a dollar value on a benefit *considered by itself*, the employee may very well be able to point to foregone alternatives to demonstrate the dollar value *by comparison*. *See id.*[57] Since under the decision below benefits will no longer be "limited and determinate" and known in advance to be a "fixed amount," *Pepco, supra*, 449 U.S. at

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ond) of Contracts §§ 1 & 4 (1979). Thus, under the Court of Appeals' broad reading of the term "wages," so long as the employee reached some understanding with his employer that he was to receive a particular item in exchange for his labor—whether that understanding was written, oral, or quasi-contractual—the item would be covered "wages" under the LHWCA.

[56] As this Court has held, "[e]mployees value a job for many reasons besides the rate of pay, including, for example, the presence of other workers of the employee's own sex, the availability of recreational facilities at the worksite, staggered work hours, better health benefits, longer vacations, and so forth. What makes one job better than another varies from one employee to another." *Ford Motor Co.* v. *EEOC*, 102 S. Ct. 3057, 3068 n.26 (1982).

[57] There is, furthermore, nothing in the decision below which forecloses an employee from claiming not merely the dollar value of an employer's *contributions* to trust funds such as those involved in the present case, but also the present value of the expected *receipts* from those contributions. Thus, in cases like the present one, it could easily be argued that the value of the contingent right to receive further payments from health, pension, and training trust funds must be assessed and added to "wages."

282 n.24, it will inevitably follow that those benefits will be disputed and their delivery delayed.

E. The Decision Below Will Frustrate The Basic Purpose Of Swift, Efficient Delivery Of Benefits.

To be sure, the court below concluded that in this case the value of the fringe benefits at issue could reasonably be measured "by the amount of the employer's contributions to the various fringe benefit funds." Pet. App. 13a-14a. But even accepting that measurement approach, it ignores reality to suppose that other valuation methodologies will not be contended for (including present value of future benefit receipts); that all trust funds will be consistently constructed on a cents-per-hour-per-employee basis;[58] that the myriad kinds of employee "values" pre-

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[58] Of course, this will not be the case. Where similar benefits are provided by employers who are *self-insured*, it is quite possible that no "valuation" figures at all will be available. And even where payments are made directly to trust funds, it is not uncommon for them to be far more complex in nature than the funds in this case. For example, trust fund payments on the docks of New York are handled quite differently from those presented here.

In New York, a flat sum ($2 per man/hr.) is paid, pursuant to a collective bargaining agreement, into a primary welfare trust fund, and another flat sum ($3 per man/hr.) is paid into a primary pension trust fund. However, each primary fund is actually composed of separate trust funds, operating under separate trust agreements. Once payment has been made into the primary fund, the trustees, with the help of their actuaries, determine how much will go to each of the constituent funds. Their judgment is based upon an estimate of the amount per year needed to operate each fund. Thus, in one year, $1 may go into fund A, $.50 into fund B, $.25 into fund C, and so on. In another year, even though the basic payment may remain the same, the amount allocated to each separate fund may vary from the year before. Thus, what each injured employee or survivor of a deceased employee *receives* is not determined by the collective bargaining agreement, but rather by the various trust fund agreements and the independent decisions of the trustees. And, in turn, what is paid out also depends upon a number of factors, such as the number of years the employee has been in the workforce. In fact, some of the fund agreements provide that if a worker

viously discussed will not quickly become the subject of thousands of compensation claims; that longshoremen will not take advantage of the opportunity to "earn" workers' compensation benefits exceeding their pre-injury income; and that the promise of attorney's fees available in any case where compensation is obtained beyond that voluntarily paid (33 U.S.C. § 928(a)) will not provide an additional incentive to litigate these issues.

The only realistic assessment of the impact of the decision below is that enormous difficulties will be encountered by employers who in good faith attempt to assess a per-employee "value" of fringe benefits, as defined by the court below; by the Department of Labor which must calculate such values *nationwide* in order to compute a "national average weekly wage," both for the future and retroactively; and, most importantly, by the already-overburdened administrative agencies (*see Comptroller General's Report* at 30-32) and courts which will be inundated by cases litigating a wealth of "value" issues

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is out of work owing to a disability, his credits continue to accumulate in the respective funds.

A further complication is that while some funds are based on man-hours worked, others are based on tonnage, and still others are based on a combination of the two. For example, if an estimate is made at the beginning of a year that a fund will need $200,000 during that year, and it is further estimated that 200,000 man-hours will be worked, the employer will contribute $1.00 per man-hour. So in another fund, if the same amount will be needed and it is estimated that 500,000 tons will be shipped, the employer will have to contribute on the basis of $.40 per ton. But in a third type of fund, 80% of the contributions may be made on the basis of man-hours worked and 20% on a tonnage basis. This latter technique is used on the West Coast, where a defined benefit procedure has been established in the collective bargaining agreement, but the separate pension fund agreement determines who will actually be eligible for payments and how much they will receive. And even here for payments and how much they will receive. And even here the 80-20 split has to be approved by the Federal Maritime Commission, despite the fact that it is outside the collective bargaining agreement.

never seen before. The current system will almost surely be brought to its knees, and, without question, the "swift and sure" delivery of benefits which Congress intended will not be preserved.

The net result will border on an effective *judicial* repeal of the 1927 Act, exchanging the current compensation system for the state of affairs existing before workers' compensation programs were enacted. Guaranteeing a disabled worker virtually all of the benefits of full employment will in practice resurrect the system Congress interred in 1927—that is, it will substitute an uncertain tort recovery for a fixed compensation award, and litigation for swift and sure benefits.

In fact, the decision below will go the tort system one better. Notwithstanding the ⅔ limitation on compensation awards, the inclusion of fringe benefits in "wages" will in practice provide disabled workers with *greater* income while out of work than while fully employed. The opportunity to obtain such a recovery will inspire endless litigation as the administrative process and the courts struggle to define the types of fringe benefits compensated by the Act, thereby sabotaging Congress' plan to provide prompt and certain disposition of benefits and calculation of costs. *See, e.g., Norton* v. *Warner Co.*, 321 U.S. 565, 568 (1944).

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This Court has often observed that "it is not to be lightly assumed that Congress intended that the LHWCA produce incongruous results." *Pepco, supra*, 449 U.S. at 283; *accord, e.g., Voris* v. *Eikel, supra*, 346 U.S. at 333; *Baltimore & Phila. Steamboat Co.* v. *Norton, supra*, 284 U.S. at 414. The Court has also made clear that it "cannot interpret federal statutes to negate their own stated purpose," *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 419-420 (1973), a principle the Court has twice applied to the LHWCA itself. *See Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 85-86

(1980); *Edmonds* v. *Compagnie Generale Transatlantique, supra*, 443 U.S. at 258. Both of the stated principles apply with particular force here: the decision below will produce not only incongruous results, but ones that will subvert—if not effectively repeal—the statute.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

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